NO. 47965-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOSHUA THEMBI REEVES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00088-0

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State charged Joshua Reeves (hereafter 'Reeves') with Attempted Rape of a Child in the First Degree and Attempted Child Molestation in the First Degree for an incident involving L.B. CP 21-22. The incident likely occurred in 2011, but was not disclosed or reported to police until late 2013. The case proceeded to trial in Clark County Superior Court in June 2015. RP 301. L.B., her parents, her friend, M.L., M.L.'s mother, several police officers, and a forensic interviewer testified for the State. RP 301-737. Reeves and his investigator testified for the defense. RP 748-810. A jury returned guilty verdicts on both counts

involving L.B.[1] CP 73-74.

At trial, the evidence showed that L.B., a child born in 2004, told her father when she was nine years old that she believed she had been molested. RP 409-10. Her father asked if someone who was not supposed to touch her had touched her, and she told him yes. RP 412. L.B.'s mother asked her the next day about what she said to her dad. RP 426. L.B. told her mom that "Julie's taller son" had touched her. RP 427. Julie is a family friend and Joshua Reeves (hereafter 'Reeves') is her son. RP 431, 459. L.B.'s mom had L.B. show her using a teddy bear what happened with Reeves. RP 429. L.B. lay one of the teddy bears down and demonstrated that one teddy bear tried to remove the bear that was lying down's pants. RP 429. L.B. told her mom that the pants did not come all the way off. RP 429. L.B. told her mom that after that, she tried to get up but "he" pushed her back down; when she got up again she realized the door was locked. RP 429-30. Reeves then showed her his private area. RP 430.

L.B. testified that something happened between her and Reeves when she was "probably six." RP 514. L.B. was over at her friend's house when Reeves approached her and asked her to come with him. RP 516. L.B. said "okay" and went into a bedroom with him. RP 517. Reeves

[1] L.B.'s friend, M.L., was also the named victim in two counts for child molestation and attempted child molestation from approximately the same time period, however the jury acquitted Reeves of the counts involving M.L. CP 22, 75-76.

closed the door and picked L.B. up and laid her on the floor. RP 517-18. Reeves positioned himself above her and he pulled her shorts down a little bit. RP 518-21. L.B. then got up and went over to the wall. RP 521. She was feeling scared. Reeves then asked her, "will you suck on this?" RP 521. L.B. saw that Reeves' "dude part was out" and she shouted no. RP 522. When asked to clarify what L.B. meant by "dude part," she indicated it was "his nuts." RP 522. L.B. shouted no and left the room. RP 523. Reeves told her not to tell anybody. RP 523. L.B. left and went and played with her friend. RP 523. L.B. did not tell her parents about this until she was nine years old because she was afraid her parents would be mad at her. RP 524.

After L.B. talked to her father and mother about what happened, her mother contacted L.B.'s friend M.L.'s mother, who is close friends with Reeves' mother. RP 431. They then decided to call the police. RP 431-32. L.B. was interviewed by a forensic interview at the Children's Justice Center soon after she disclosed the incident. RP 477; 479. This interview was recorded and the recording was admitted into evidence. RP 481. The recording was played for the jury during the trial. RP 720-22.

Before the jury began its deliberations, the court instructed the jury. One of the instructions was the standard WPIC 4.01 on reasonable doubt and read as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 69.

After the jury returned its verdicts, the court ordered a presentence investigation, and a report was completed prior to sentencing. CP 77-91. The trial court sentenced Reeves to the low end of the standard sentence range with an offender score of 0, not scoring counts 1 and 2 against each other. CP 95-96. The trial court ordered Reeves to 36 months of community custody and included mental health evaluation and comply with treatment recommendations as one of the conditions. CP 97-98; 111-13. The trial court also included a requirement that Reeves submit to plethysmography testing at the direction of his community corrections officer. CP 111. Reeves then filed the instant appeal. CP 114.

ARGUMENT

I. The Trial Court Properly Instructed the Jury on Reasonable Doubt.

Reeves argues the trial court erred in giving the standard beyond a reasonable doubt instruction as found in WPIC 4.01 because it shifted the burden of proof and undermined his presumption of innocence. The trial court properly used WPIC 4.01 to instruct the jury, and this instruction did not shift the burden of proof or undermine Reeves' presumption of innocence. The trial court should be affirmed.

As an initial matter, Reeves did not object to the propriety of WPIC 4.01 at trial. RP 658; 684. A defendant generally waives the right to appeal an error unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception to this rule is made for manifest errors affecting a constitutional right. RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Reeves claims an error of constitutional magnitude in assigning error to the trial court's use of a particular instruction for the burden of proof. However, Reeves fails to show either error or prejudice in the court's giving of this instruction.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *Pirtle,* 127 Wn.2d at 656. This Court reviews a challenged jury instruction de novo. *Id.* The challenged instruction must be evaluated in the context of all the instructions as a whole. *Id.* "We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *Pirtle,* 127 Wn.2d at 656.Jury instructions are upheld if they allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Reeves challenges WPIC 4.01, an instruction which has never been held to be improper. In fact, the Supreme Court directed trial courts to use this instruction to instruct juries on reasonable doubt. *Bennett*, 161 Wn.2d at 318. The trial court below used WPIC 4.01, and made no amendments, additions or deletions to the standard instruction. CP 69. Reeves argues that despite this mandate from the Supreme Court, the instruction informs jurors that they must be able to articulate their doubt, essentially filling in the blank as to why they find a defendant not guilty. Br. of Appellant, p. 9.

Our courts have approved the language of WPIC 4.01 as constitutionally valid for many years. In *State v. Thompson*, 13 Wn.App. 1, 533 P.2d 395 (1975), the Court on appeal considered the phrase "a doubt for which a reason exists" and found this statement does not direct the jury to assign a reason or reasons for their doubts, but simply points out that their doubts must be based on reason, and cannot be something vague or imaginary. *Thompson*, 13 Wn.App. at 5. In fact, the Court in *Thompson* stated, "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years." *Id.* (citing *State v. Harras*, 25 Wn. 416, 65 P. 774 (1901)). Adding the 41 years that have passed since *Thompson* was issued, our jurisdiction has now approved this language for well over a century.

Reeves cites to *Kalebaugh, supra* to support his argument that the instruction given below improperly shifted the burden of proof. In *Kalebaugh* the trial court gave a proper WPIC 4.01 instruction on beyond a reasonable doubt, but in its preliminary comments the court attempted to further explain the instruction by telling the jury that it meant "a doubt for which a reason can be given." *Kalebaugh*, 183 Wn.2d at 585. The Supreme Court did not like the trial court's "offhand explanation," but found the error was harmless as the court went on the properly instruct the jury, using WPIC 4.01, at the end of the case. *Id.* at 586.

Reeves also cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) to support his argument. In *Emery*, the prosecutor argued in closing argument that "in order for you to find the defendant not guilty ... you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. ... If you think you have a doubt, you must fill in that blank." *Emery,* 174 Wn.2d at 750-51. This statement by the prosecutor did shift the burden of proof to the defendant to disprove his guilt. However, the Supreme Court found this argument was harmless error as the trial court properly instructed the jury on the reasonable doubt standard, via WPIC 4.01, and the appellant could not show the prosecutor's argument affected the jury's verdict. *Id.* at 762-63. Though *Emery* did not involve an argument about the appropriateness of the language in WPIC 4.01, it shows the Supreme Court's continued approval of WPIC 4.01, even for the language Reeves now objects to of "a doubt for which a reason exists...." Our Supreme Court has consistently approved the use of WPIC 4.01 in criminal jury trials, and even directed trial courts to use it. The trial court below properly instructed the jury on the reasonable doubt standard, and our State's jurisprudence shows this instruction is constitutionally firm and appropriate.

Based on our Courts' past approval of WPIC 4.01 for instructing a jury on the reasonable doubt standard, this court should affirm the trial

court's giving of this instruction. The principle of *stare decisis* requires that when an issue has been previously decided, it cannot be overturned absent a finding that the prior decision is both incorrect and harmful. *State v. Lucky,* 128 Wn.2d 727, 735, 912 P.2d 483 (1996). This principle "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). The trial court below followed our Supreme Court's directive in *Bennett, supra.* The court did so with no objection from Reeves. The interests of justice require the consistent application of our prior jurisprudence, and here, this compels rejection of Reeves' argument. The trial court should be affirmed.

II. The State Agrees the Conviction for Attempted Child Molestation in the First Degree should be Vacated.

Reeves argues his convictions for attempted rape of a child and attempted child molestation violate double jeopardy. The State does not concede that rape of a child and child molestation are the same offense for double jeopardy, generally. *See State v. Jones*, 71 Wn.App. 798, 824-25, 863 P.2d 85 (1993). However, pursuant to the facts and the arguments made in this particular case, because the State did not clarify the separate

offenses in its argument to the jury, the State agrees this Court should vacate the attempted child molestation conviction entered below. As the trial court found the two convictions encompassed the same criminal conduct and did not score the offenses against each other, this vacation does not affect Reeves' sentence. Reeves' standard range sentence on the Attempted Rape of a Child in the First Degree conviction should be affirmed.

The remedy for double jeopardy is to vacate the conviction for the lesser offense. *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). Rape of a Child in the First degree is a class A felony. RCW 9A.44.073(2). Child Molestation in the First Degree is also a class A felony. RCW 9A.44.083(2). Attempt of both crimes are also class A felonies. RCW 9A.28.020(3)(a). However, Child Molestation in the First Degree has a seriousness level of 10, while Rape of a Child in the First Degree has a seriousness level of 12. RCW 9.94A.515. Attempt crimes do not have a separate seriousness level, but rather the sentence for such a conviction is determined by taking 75% of the standard range of the completed offense. RCW 9.94A.533(2). The "lesser offense" for double jeopardy purposes is the crime which carries the lesser sentence. *Weber*, 159 Wn.2d at 269. In Reeves' case, the Attempted Child Molestation in the First Degree carries the lesser sentence. *See* CP 95. Attempted Child

Molestation in the First Degree is the lesser offense and the one that should be vacated. As Reeves suggests, this Court should remand for vacation of the Attempted Child Molestation in the First Degree conviction and enter an amended judgment reflecting as such.

III. The Trial Court Properly Ordered a Mental Health Evaluation and Treatment as Part of Reeves' Conditions of Community Custody.

Reeves argues the trial court erred in imposing a mental health evaluation and to complete any recommended treatment as part of his conditions of community custody. The trial court properly exercised its authority and discretion to order Reeves participate in crime-related treatment. The trial court's imposition of mental health treatment should be affirmed.

RCW 9.94A.703(3)(c) authorizes a trial court to require a defendant to participate in crime-related treatment or counseling services as part of the terms of community custody. The trial court is also authorized to require the defendant "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d). Regarding mental health treatment specifically, RCW 9.94B.080 allows a trial court to

sentence a defendant to participate in a mental health evaluation and treatment

> ...if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080. This statute no longer requires the imposition of this condition be based on a presentence report (compare former RCW 9.94B.080 with current version), but simply indicates the trial court's order *may* be based on such a report.

At sentencing, counsel for Reeves admitted and agreed that Reeves had a diminished mental capacity and ability to cope. During the hearing, counsel for Reeves discussed his mental state, his likely lesser ability to conform his conduct to society after prison, and essentially argued his mental health issues were mitigating factors which warranted a lesser sentence. RP 973-75. The presentence report was replete with references to Reeves' mental issues and discussed that he has been a Columbia River Mental Health client since 1997, that he has been on medication since the age of 3, that he has been diagnosed with ADHD, Impulse control

disorder, learning disabilities, and developmental delay. CP 85-87. Reeves' mother and caretaker indicated when Reeves is not on medication and not in mental health treatment that there are frequent behavior problems. CP 87. Upon sentencing Reeves to the low end of the standard range and a term of community custody, the trial court noted it hoped "the Corrections System for the State of Washington will provide some services to offer Mr. Reeves an opportunity to improve himself." RP 988. Though the trial court did not orally discuss his imposition of mental health evaluation and treatment as part of the sentence, it is clear from the pre-sentence report, the prosecutor's comments at sentencing, defense's concession at sentencing, and the trial court's stated desire that Reeves receive services through the corrections system, that Reeves had significant mental health issues, that all parties involved believed mental health treatment was necessary for Reeves to function appropriately in society after his release from prison, and that this had contributed to his commission of the crime. The evidence clearly shows that Reeves' commission of this offense was crime-related and the trial court properly imposed this condition at sentencing. The trial court should be affirmed.

IV. The State Agrees and Concedes the Plethysmography Testing Conditions is Improper.

Reeves assigns error to the trial court's imposition of a condition of community custody that requires he submit to plethysmography exams at the direction of a community custody officer. The State agrees and concedes that the imposition of this condition was improper and the matter should be remanded to strike this condition from his judgment and sentence.

Reeves was sentenced to a community custody condition that requires Reeves to "[s]ubmit to plethysmography exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 111. In *State v. Land, 172 Wn.App. 593, 295 P.3d 782 (2013),* this court held that a condition requiring an individual to submit to plethysmograph testing subject only to the discretion of a community corrections officer violates a defendant's constitutional right to be free from bodily intrusions. *Land,* 172 Wn.App. at 605. This Court concluded that while plethysmograph testing "can properly be ordered incident to crime-related treatment by a qualified provider," the testing "may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer." *Land,* 172 Wn.App. at 605.

In *State v. Riles,* 135 Wn.2d 326, 343–45, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia,* 169 Wn.2d 782, 239

P.3d 1059 (2010), the Washington Supreme Court upheld conditions requiring plethysmograph testing as part of the defendant's sexual deviancy treatment. The court concluded that plethysmograph testing is "a treatment device that can be imposed as part of crime-related treatment or counseling." *Riles,* 135 Wn.2d at 345. However, "[i]t is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment" because "[p]lethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions." *Riles,* 135 Wn.2d at 345.

Here, the court ordered Reeves to participate in plethysmograph testing at the sole discretion and direction of his community custody officer. This is factually on par with *Land* and distinguishable from *Riles*. Therefore, it appears the condition regarding plethysmography testing was imposed for the purpose of monitoring Reeves, and not as part of his treatment requirements. This Court should remand this matter with direction to strike the offending condition from Reeves' sentence.

V. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

Reeves argues under *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is

indigent. The State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016) at p. 2-3; *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*,

97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra* at 5, prematurely raises an issue that is not yet before the Court. Lewis could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing

discretionary LFOs. But, as *Sinclair* points out at p. 5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

For the foregoing reasons, Reeves' Attempted Rape of a Child in the First Degree conviction should be affirmed, and the matter should be remanded to vacate count 2 and for correction of the judgment and sentence to reflect this vacation, and to strike the plethysmography condition. The trial court should be affirmed in all other respects.

DATED this 21st day of June 2016.

Respectfully submitted:

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